

percent more per hour. In the enactment of section 7(f), as in the enactment of section 7(b) (1) and (2), the benefits that might inure to employees from a balancing of long workweeks against short workweeks under prescribed safeguards would seem to be the reason most likely to have influenced the legislators to provide express exemptions from the strict application of section 7(a). Consequently, where the fluctuations in an employee's hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not "irregular" within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption. (See *Goldberg v. Winn-Dixie Stores* (S.D. Fla.), 15 WH Cases 641; *Wirtz v. Midland Finance Co.* (N.D. Ga.), 16 WH Cases 141; *Trager v. J. E. Plastics Mfg. Co.* (S.D.N.Y.), 13 WH Cases 621; *McComb v. Utica Knitting Co.*, 164 F. 2d 670; *Foremost Dairies v. Wirtz*, 381 F. 2d 653 (C.A. 5).)

§ 778.407 The nature of the section 7(f) contract.

Payment must be made "pursuant to a bona fide individual contract or pursuant to an agreement made as a result of collective bargaining by representatives of employees." It cannot be a one-sided affair determinable only by examination of the employer's books. The employee must not only be aware of but must have agreed to the method of compensation in advance of performing the work. Collective bargaining agreements in general are formal agreements which have been reduced to writing, but an individual employment contract may be either oral or written. While there is no requirement in section 7(f) that the agreement or contract be in writing, it is certainly desirable to reduce the agreement to writing, since a contract of this character is rather complicated and proof both of its existence and of its compliance with the various requirements of the section may be difficult if it is not in written form. Furthermore, the contract must be "bona fide." This implies that both the making of the contract and the settlement of its terms were done in good faith.

§ 778.408 The specified regular rate.

(a) To qualify under section 7(f), the contract must specify "a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable)." The word "regular" describing the rate in this provision is not to be treated as surplusage. To understand the nature of this requirement it is important to consider the past history of this type of agreement in the courts. In both of the two cases before it, the Supreme Court found that the relationship between the hourly rate specified in the contract and the amount guaranteed was such that the employee in a substantial portion of the workweeks of the period examined by the court worked sufficient hours to earn in excess of the guaranteed amount and in those workweeks was paid at the specified hourly rate for the first 40 hours and at time and one-half such rate for hours in excess of 40 (*Walling v. A. H. Belo Company*, 316 U.S. 624, and *Walling v. Halliburton Oil Well Cementing Company*, 331 U.S.17). The fact that section 7(f) requires that a contract, to qualify an employee for exemption under section 7(f), must specify a "regular rate," indicates that this criterion of these two cases is still important.

(b) The regular rate of pay specified in the contract may not be less than the applicable minimum rate. There is no requirement, however, that the regular rate specified be equal to the regular rate at which the employee was formerly employed before the contract was entered into. The specified regular rate may be any amount (at least the applicable minimum wage) which the parties agree to and which can reasonably be expected to be operative in controlling the employee's compensation.

(c) The rate specified in the contract must also be a "regular" rate which is operative in determining the total amount of the employee's compensation. Suppose, for example, that the compensation of an employee is normally made up in part by regular bonuses, commissions, or the like. In the past he has been employed at an hourly rate of \$5 per hour in addition to which he has received a cost-of-living bonus

of \$7 a week and a 2-percent commission on sales which averaged \$70 per week. It is now proposed to employ him under a guaranteed pay contract which specifies a rate of \$5 per hour and guarantees \$200 per week, but he will continue to receive his cost-of-living bonus and commissions in addition to the guaranteed pay. Bonuses and commissions of this type are, of course, included in the "regular rate" as defined in section 7(e). It is also apparent that the \$5 rate specified in the contract is not a "regular rate" under the requirements of section 7(f) since it never controls or determines the total compensation he receives. For this reason, it is not possible to enter into a guaranteed pay agreement of the type permitted under section 7(f) with an employee whose regular weekly earnings are made up in part by the payment of regular bonuses and commissions of this type. This is so because even in weeks in which the employee works sufficient hours to exceed, at his hourly rate, the sum guaranteed, his total compensation is controlled by the bonus and the amount of commissions earned as well as by the hourly rate.

(d) In order to qualify as a "regular rate" under section 7(f) the rate specified in the contract together with the guarantee must be the actual measure of the regular wages which the employee receives. However, the payment of extra compensation, over and above the guaranteed amount, by way of extra premiums for work on holidays, or for extraordinarily excessive work (such as for work in excess of 16 consecutive hours in a day, or for work in excess of 6 consecutive days of work), year-end bonuses and similar payments which are not regularly paid as part of the employee's usual wages, will not invalidate a contract which otherwise qualifies under section 7(f).

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7317, Jan. 23, 1981]

§ 778.409 Provision for overtime pay.

The section 7(f) contract must provide for compensation at not less than one and one-half times the specified regular rate for all hours worked in excess of the applicable maximum hours standard for the particular workweek. All excessive hours, not merely those

covered by the guarantee, must be compensated at one and one-half times (or a higher multiple) of the specified regular rate. A contract which guaranteed a weekly salary of \$169, specified a rate of \$3.60 per hour, and provided that not less than one and one-half times such rate would be paid only for all hours up to and including 46 $\frac{2}{3}$ hours would not qualify under this section. The contract must provide for payment at time and one-half (or more) for all hours in excess of the applicable maximum hours standard in any workweek. A contract may provide a specific overtime rate greater than one and one-half times the specified rate, for example, double time. If it does provide a specific overtime rate it must provide that such rate will be paid for all hours worked in excess of the applicable maximum hours standard.

[46 FR 7317, Jan. 23, 1981]

§ 778.410 The guaranty under section 7(f).

(a) The statute provides that the guaranty must be a weekly guaranty. A guaranty of monthly, semimonthly, or biweekly pay (which would allow averaging wages over more than one workweek) does not qualify under this paragraph. Obviously guarantees for periods less than a workweek do not qualify. Whatever sum is guaranteed must be paid in full in all workweeks, however short in which the employee performs any amount of work for the employer. The amount of the guaranty may not be subject to proration or deduction in short weeks.

(b) The contract must provide a guaranty of pay. The amount must be specified. A mere guaranty to provide work for a particular number of hours does not qualify under this section.

(c) The pay guaranteed must be "for not more than 60 hours based on the rate so specified."

§ 778.411 Sixty-hour limit on pay guaranteed by contract.

The amount of weekly pay guaranteed may not exceed compensation due at the specified regular rate for the applicable maximum hours standard and at the specified overtime rate for the additional hours, not to exceed a total of 60 hours. Thus, if the maximum